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12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14 **WESTERN DIVISION**

16 GRANITE STATE INSURANCE
17 COMPANY, a Pennsylvania
corporation, and FEDERAL
18 INSURANCE COMPANY, an
Indiana corporation,

19 Plaintiffs,

20 vs.

21 GENERAL MOTORS LLC, a
limited liability company

22 Defendant.

Case No: 2:11 CV-02611-CAS-AJW

**DEFENDANT GENERAL MOTORS
LLC'S MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT [Fed. R. Civ. P. 56]**

Hearing Date: September 10, 2012
Time: 10:00 a.m.
Courtroom 5
Hon. Christina A. Snyder

Complaint Filed: March 29, 2011
Trial Date: October 9, 2012

25 Defendant General Motors LLC (“New GM”) respectfully submits this
26 memorandum in support of its motion for summary judgment on all claims for
27 relief pleaded in the complaint (“Compl.”) of plaintiffs Granite State Insurance
28 Company (“Granite State”) and Federal Insurance Company (“Federal”).

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INTRODUCTION

This case turns entirely on the interpretation of a contract: the Dealer Sales and Service Agreement (“Dealer Agreement”) between General Motors Corporation (“Old GM”) and its authorized dealership, Renick Cadillac, Inc., (“Renick”). Specifically, in Article 17.4 of the Dealer Agreement, Old GM agreed to defend Renick in a product liability case and indemnify it ***for any resulting money judgment***. Plaintiffs are Renick’s insurers, which have sued General Motors LLC (“New GM”) to recover money they chose to pay to ***settle*** the product case against Renick without Old GM’s consent or approval – a monetary obligation that the clear indemnification language of Article 17.4 simply does not cover.

All of Plaintiffs’ claims, however denominated, require proof that the Dealer Agreement obligated Old GM (and, as a consequence of its bankruptcy-related asset sale, New GM) to either accept the settlement that Old GM did not want to accept or indemnify Granite State and Federal – strangers to the Dealer Agreement – for the settlement that they unilaterally chose to fund on Renick’s behalf.

Because the clear language of Article 17.4 of the Dealer Agreement required Old GM to indemnify Renick only for monetary judgments, ***not settlements***, Old GM, following the settlement, had no indemnification obligations to Renick or the plaintiff insurance companies as a matter of law. The same is true of New GM, to which the Dealer Agreement was assigned in a transaction approved by Old GM’s Bankruptcy Court ***after the plaintiff insurance companies had decided to settle the product liability case***. Following the assignment, the same contractual provision – Article 17.4 – only obligated New GM to defend Renick (which was no longer necessary since the case had been settled) and to indemnify it for money judgments, ***not settlements entered into without its consent***. Accordingly, and without more, New GM is entitled to judgment as a matter of law.

The indemnification provisions of the Dealer Agreement are very clear. Once Old GM accepted Renick’s request to defend the product liability case, Old

1 GM, not Renick, was responsible for 100 percent of any resulting judgment –
 2 whether it exceeded the policy limits of Renick’s insurance or not. Since Old GM
 3 was “playing with its own money,” and had an obvious interest in obtaining and
 4 retaining control over product liability litigation involving GM vehicles,¹ Old GM
 5 was entitled to decide on its own whether to defend or settle the underlying claim.
 6 It decided, as the Dealer Agreement clearly entitled it to do, to reject the proposed
 7 \$6 million settlement and defend the claim. The plaintiff insurance companies
 8 elected to override that decision as to Renick, and the responsibility for doing so
 9 now rests solely with them.

10 In an attempt to squirm out of that position, and contrary to well-established
 11 principles of contract interpretation, Renick’s insurers now want to go *outside* the
 12 four corners of the Dealer Agreement and have the Court imply an agreement by
 13 Old GM to accept the \$6 million settlement offer based on the possibility of a
 14 bankruptcy filing by Old GM. Any such implied agreement, however, would clash
 15 frontally with the language of the Dealer Agreement that placed the decision to
 16 settle, or not, squarely with Old GM. That Old GM might file for bankruptcy did
 17 not alter or augment Old GM’s obligations under the Dealer Agreement –
 18 obligations that did not include the duty to indemnify the plaintiff insurance
 19 companies for a settlement that they chose to pay for their own reasons.

20 To be sure, the insurers claim that the spectre of a possible bankruptcy filing
 21 created a dilemma based on their fear of a bad faith action by Renick if (as did not
 22 occur) Old GM after filing bankruptcy were to forswear its obligations under
 23 Article 17.4 and an ultimate judgment against the dealership exceeded the \$6
 24 million policy limits and the value of Renick’s unsecured bankruptcy claim against
 25 Old GM for indemnity (to which plaintiffs would be subrogated). But that fear

27 ¹ Excessive settlements, other things being equal, encourage additional claims and
 28 embolden existing and future claimants to seek higher settlements, to say nothing of
 the immediate adverse economic impact of the settlement itself.

1 placed the insurers in no worse position than any creditor in a potential bankruptcy.
 2 Lots of people are harmed by bankruptcy. The plaintiff insurers – which would
 3 have been indirect subrogated creditors of Old GM if they had had to pay an excess
 4 judgment – have no right to improve their position vis-à-vis other creditors through
 5 the artifice of an indemnity claim against New GM, which did not even exist at the
 6 time plaintiffs settled the case and which never agreed to pay for that settlement.
 7 Simply put, the insurers have no implied right to lay off their voluntary settlement
 8 payments on New GM.

9 Instead, this case begins and ends with an issue of straightforward contract
 10 interpretation, the kind of issue that is especially appropriate for summary
 11 disposition. New GM is entitled to judgment as a matter of law because Article
 12 17.4 simply does not cover independent settlements by a dealer's insurers.

13 **FACTUAL BACKGROUND**

14 **I. The *Deutsch* Lawsuit**

15 This dispute arises out of plaintiffs' decision to settle a lawsuit against
 16 Renick arising from an automobile accident. Renick leased a 2006 Cadillac DTS to
 17 Beverly Deutsch. On June 27, 2007, she drove it into the back of a Los Angeles
 18 Metro Transit Authority bus. (*See* Compl. ¶10.) She and her husband Sanford (the
 19 "Deutsch Plaintiffs") filed a product liability lawsuit in April 2008 in California
 20 state court against, among others, Old GM and Renick (the "Deutsch Action").
 21 (*See id.* ¶11.) The *Deutsch* Plaintiffs alleged that, *inter alia*, the Cadillac DTS was
 22 defective because its driver's air bag failed to properly deploy and the driver's seat
 23 belt failed to properly restrain Mrs. Deutsch. (*See id.* ¶10.)

24 On May 5, 2008, Leonard Renick wrote a letter to Old GM requesting that it
 25 defend and indemnify Renick in the *Deutsch* Action under the Dealer Agreement
 26 between Old GM and Renick.² (May 5, 2008 Letter from L. Renick to Old GM, Ex.

27 ² The Standard Provisions of the Dealer Agreement, including Article 17.4, are
 28 Exhibit A in the accompanying Exhibit Appendix ("Ex. Appx.").
 3

1 Appx., Ex. B.) Old GM responded to the request on May 16, 2008, by agreeing to
 2 defend and indemnify Renick against a monetary judgment in the *Deutsch* Action
 3 pursuant to Article 17.4 of the Dealer Agreement. Old GM further advised Renick
 4 that both Renick and Old GM would be represented by Derek Whitefield of the
 5 Dykema Gossett PLLC law firm (“Dykema”). (Compl. at ¶14; May 16, 2008 Letter
 6 from D. Brown to L. Renick, Ex. Appx., Ex. C.)

7 **II. The Dealer Agreement**

8 Article 17.4 of the Dealer Agreement sets out the circumstances under which
 9 Old GM would assume defense of the *Deutsch* Action and, if necessary, indemnify
 10 Renick for an adverse judgment:

11 General Motors will assume the defense of Dealer and indemnify Dealer
 12 against ***any judgment for monetary damages*** or rescission of contract,
 13 less any offset recovered by Dealer, in any lawsuit naming Dealer as a
 14 defendant relating to any Product that has not been altered when the
 15 lawsuit concerns [a defect in the design, manufacture or assembly of a
 16 GM automobile or bodily injury caused by any of its component parts].
 17 (Ex. Appx., Ex. A, Art. 17.4 (emphasis added).) Article 17.4 expressly provides
 18 that Old GM has the right, “after accepting the defense to transfer the defense back
 19 to the Dealer and withdraw its agreement to indemnify the Dealer,” and makes clear
 20 that the “obligations assumed by General Motors are limited to those specifically
 21 described in this Article [17.4] and in the Service Policies and Procedure Manual”
 22 (the “GM Service Manual,” pertinent excerpts are in Ex. Appx., Ex. D). (*Id.*)

23 The Dealer Agreement does not contain any provision requiring GM to
 24 indemnify the Dealer for a settlement. It speaks only to indemnification for a
 25 “judgment for monetary damages.” Settlement is not even mentioned in Article
 26 17.4, and it is mentioned only once in the GM Service Manual, which Article 17.4
 27 incorporates by reference and which provides – in circumstances different from the
 28

1 present case – for indemnification for a settlement only if the amount is approved
2 by GM in advance. That provision reads:

3 GM may, at its election, agree only to indemnify dealer and require
4 dealer to conduct its own defense. In the event of such requirement,
5 dealer shall conduct its own defense and the liability of GM will be
6 limited to the out-of-pocket costs of such defense, including reasonable
7 attorneys' fees, together with the amount of any monetary judgment
8 paid by dealer (***or the amount of final settlement paid by dealer if such
amount was approved in advance by GM***) provided GM is promptly
9 notified thereof.

10 (See Ex. D at Art. 7.1.2(e) (emphasis added).)

11 Other important provisions of the Dealer Agreement provide that the
12 agreement is governed by Michigan law (Article 17.12) and that it does not create
13 any third-party beneficiary rights (Article 17.9). (See Ex. A.)

14 GM's May 16, 2008 letter to Renick expressly stated that GM was only
15 agreeing to indemnify against a judgment for monetary damages, specifically
16 reserved Old GM's right to withdraw its agreement to indemnify and to tender the
17 defense back to Renick, and specifically incorporated the "Indemnification
18 Limitations provisions of the [GM Service] Manual," set out above. (See Ex. C.)

19 **III. The Settlement of *Deutsch* by Renick's Insurers**

20 Old GM, through Dykema, defended Renick in the *Deutsch* Action through
21 June 1, 2009 (the date that the plaintiff insurance companies agreed to settle the
22 case). (Compl. ¶58.) During discovery in the *Deutsch* Action, Renick had
23 disclosed that it had a \$1 million primary insurance policy with Granite State and a
24 \$5 million excess liability policy with Federal. On December 11, 2008, using the
25 possibility of an Old GM bankruptcy as leverage, the Deutsches' counsel made the
26 first of several \$6 million policy limits demands on Renick under California Code
27 of Civil Procedure §998; this demand was for settlement of the claims only against

1 Renick (*i.e.*, it did not include settlement of the product liability claims against Old
2 GM). (Compl. at ¶17; Ex. G to Compl. (Ex. Appx., Ex. E.)) No similar demand
3 was ever made on Old GM. By statute, the demand to Renick was to remain open
4 until January 10, 2009. (*See* Ex. E.)

5 Because the possibility that Old GM might file for bankruptcy had been
6 raised, Old GM's and Renick's joint counsel, Mr. Whitefield, identified a potential
7 conflict of interest that prevented him from giving any advice regarding Renick's
8 response to the initial \$6 million settlement demand in December 2008. (April 3,
9 2012 Deposition of Derek Whitefield ("D. Whitefield Dep.") at 187-88, Ex. Appx.,
10 Ex. F.) He appropriately disclosed that potential conflict and advised Renick to
11 seek advice from independent counsel about how to respond to the Deutsches'
12 policy limits demand. (*See id.*)³

13 On December 29, 2008, Mr. Whitefield, in response to plaintiffs' requests,
14 sent two case evaluations he had previously prepared and other case related
15 materials to Douglas Rothman of Chubb Insurance Group (Federal's parent
16 company) and to lawyers representing Granite State. (December 29, 2008 e-mail
17 from D. Whitefield to D. Rothman, Ex. Appx., Ex. G.) The more recent of the two
18 case evaluations, a letter dated September 8, 2008, shows that Dykema had
19 "previously recommended exploring the possibility of settlement with plaintiffs *in*
20 *the range of six figures*," and this letter did not alter the prior recommendation.
21 (*See* Ex. E to Compl.) Renick and its insurers allowed the December 11, 2008
22 statutory settlement demand to expire without responding to it.

23 The Deutsches renewed their settlement demand in February 2009, giving
24 Renick two weeks to accept the \$6 million demand. (February 18, 2009 Letter
25 from B. Novack to D. Whitefield, Ex. Appx., Ex. H.) Once again, Mr. Whitefield

26
27 ³ Mr. Whitefield similarly advised Old GM that he likewise could not advise it
28 regarding the settlement demand made on Renick. (D. Whitefield Dep. at 212-13,
Ex. Appx., Ex. F.)

1 wrote Renick (this time copying Renick's insurers and the insurers' lawyers)
2 advising that he could not provide the dealership with advice in connection with
3 this demand. (April 5, 2012 Deposition of Leonard Renick at 88-90, Ex. Appx.,
4 Ex. I.) The insurers again let the demand expire without any response.

5 On May 26, 2009, the Deutsches' lawyer wrote directly to Renick's long-
6 time corporate counsel, David Ward, who had become involved in the *Deutsch*
7 Action on Renick's behalf, and advised him that the \$6 million policy limits
8 demand would be made one last time and remain open until 5:00 p.m. on June 1,
9 2009. (See May 26, 2009 Letter from B. Novack to D. Ward, Ex. Appx., Ex. J;
10 Compl. ¶19.) Mr. Ward forwarded the letter to Dykema and to the lawyers for both
11 of the insurers that same day, urging that the parties "protect the Dealership." (May
12 26, 2009 E-mail with attached letter from D. Ward to A. Clarke, D. Rothman, D.
13 Whitefield, Ex. Appx., Ex. K.)

14 After receiving the May 26, 2009 letter from Ward, Federal's Mr. Rothman
15 sent Mr. Whitefield an e-mail demanding that Old GM agree to settle the case for
16 \$6 million, the amount of the Deutsches' policy limits demand. (See Compl. ¶20.)
17 On May 27, Mr. Whitefield sent Mr. Rothman an e-mail unequivocally advising
18 that "GM is not paying anything on anyone's behalf." (May 27, 2009 E-mail string
19 beginning with D. Rothman to D. Whitefield, Ex. Appx., Ex. L.) Shortly thereafter,
20 Mr. Whitefield had a conversation with Mr. Rothman in which Mr. Whitefield
21 reiterated that GM "**does not want to make any offer at this time.**" (May 29, 2009
22 E-mail from D. Rothman to C. Short, Ex. Appx., Ex. M.) (emphasis added).

23 On June 1, 2009, without ever contacting plaintiffs' counsel to try and extend
24 the 5:00 p.m. deadline, Granite State and Federal agreed to pay their policy limits of
25 \$1 million and \$5 million, respectively, to settle the Deutsches' claims against the
26 Renick dealership. (Compl. at ¶22.) At no time prior to or on June 1 did Old GM
27 approve the \$6 million settlement amount. In fact, Old GM never agreed to settle
28 on Renick's behalf for *any* amount. (See Compl. ¶21.) Moreover, despite being

1 aware that Old GM did not value the case against Renick anywhere close to \$6
2 million, the insurers never made an attempt to negotiate the settlement amount with
3 plaintiffs' counsel – from the time demand was first made in December 2008, up
4 until they agreed to pay the full policy limits demand on June 1, 2009.

5 Old GM filed a voluntary petition for bankruptcy in the United States
6 Bankruptcy Court for the Southern District of New York on June 1, 2009. (See
7 Compl. ¶23.) On the same day, Old GM sent to Renick by overnight Federal
8 Express a letter in which the dealership was given the opportunity to continue on as
9 a GM dealer pursuant to a “Participation Agreement” (the “Renick Participation
10 Agreement,” Ex. Appx., Ex. N.). (Compl. ¶24.) The letter also informed Renick
11 that Old GM and, if the bankruptcy went according to plan, New GM, would
12 continue to defend and indemnify dealerships against monetary judgments under
13 Section 17.4 of the Dealer Agreement. (Ex. N, §6(c).)

14 The next day, June 2, 2009, Mr. Whitefield sent a letter to Renick, copying
15 Renick’s independent counsel and Renick’s insurers and their counsel, stating that,
16 due to the insurers’ settlement of the claim against Renick, Dykema was
17 withdrawing as Renick’s counsel and that Old GM was re-tendering Renick’s
18 defense and withdrawing its May 16, 2008 letter whereby it had agreed to defend
19 and indemnify the dealership. (Compl. ¶25; June 2, 2009 Letter from D. Whitefield
20 to L. Renick, Ex. Appx., Ex. O.)

21 Renick executed the Participation Agreement to continue as a GM authorized
22 dealership on June 10, 2009. (Ex. Appx. Ex. N.)

23 **IV. The Bankruptcy Sale**

24 On July 10, 2009, as part of the bankruptcy proceedings, a newly formed
25 entity that is now known as General Motors LLC (“New GM”), purchased certain
26 of Old GM’s assets. (Compl. ¶28.) The Renick Dealer and Participation
27 Agreements were among the assets that New GM purchased. (Bankruptcy Court’s
28 Decision and Order, Ex. Appx., Ex. P.)

1 Granite State and Federal subsequently requested indemnification from New
2 GM – which did not even exist on June 1, 2009 – for the amounts they had agreed
3 to pay on that date to settle the *Deutsch* Plaintiffs’ claims against Renick. (Compl.
4 ¶36.) When New GM refused, plaintiffs filed this lawsuit. (See Compl. ¶39.)

5 **STANDARD FOR SUMMARY JUDGMENT**

6 Summary judgment should be granted if there are no genuine issues of
7 material fact and the moving party is entitled to judgment as a matter of law. Fed.
8 R. Civ. P. 56(c).⁴ Contract interpretation is a legal issue that may and should be
9 resolved by the Court as a matter of law. *CAZA Drilling (Ca.), Inc. v. TEG Oil &*
10 *Gas U.S.A., Inc.*, 142 Cal. App. 4th 453, 464, 48 Cal. Rptr. 3d 271, 279 (2006). All
11 of the plaintiff insurers’ claims turn on the contract between Old GM and Renick
12 and therefore may and should be decided by this Court as a matter of law.

13 **CHOICE OF LAW**

14 As a threshold matter, the Court must determine which state’s law applies in
15 this proceeding. The Dealer Agreement between Renick and Old GM contains a
16 clear and unequivocal choice-of-law provision invoking Michigan law: “This
17 agreement is governed by the laws of the State of Michigan.” (Ex. A at Art. 17.12.)
18 California law not only permits parties to choose the state’s law that governs their
19 agreement, but indeed strongly favors contractual choice-of-law provisions. *See*
20 *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 464, 11 Cal. Rptr. 2d 330,
21 332-33 (1992). As long as the state named has a substantial relationship to the
22 parties or transaction (or there exists some other reasonable basis for the parties’
23 choice of law) and the chosen state’s law is not contrary to a *fundamental* policy of

24
25 ⁴ A genuine issue of material fact must be more than a scintilla of evidence, or
26 evidence that is merely colorable or not significantly probative. *Addisu v. Fred*
27 *Meyer*, 198 F.3d 1130, 1134 (9th Cir. 2000). Courts will grant summary judgment
28 if, upon a motion, a party fails to make a showing sufficient to establish the
existence of an element essential to the party’s case, and on which that party will
bear the burden of proof at trial.

1 California, California courts will enforce the parties' choice of law. *Id.* at 466, 11
2 Cal. Rptr. 2d at 334.

3 Michigan law applies to all of plaintiffs' claims because they all turn on the
4 interpretation of the Dealer Agreement. *Id.* at 468-69, 11 Cal. Rptr. 2d at 336 (an
5 agreement's choice-of-law clause applies to "all causes of action arising from or
6 related to that agreement, regardless of how they are characterized"); *Olinick v.*
7 *BMG Entm't*, 138 Cal.App.4th 1286, 1300, 42 Cal. Rptr. 3d 268, 279 (2006)
8 (choice-of-law clause applies to claims that are "inextricably intertwined with the
9 construction and enforcement" of the contract).

10 There are no significant, let alone fundamental, differences between the
11 applicable law of Michigan and California. For example, both states require courts
12 to strictly construe the language of a contract that is clear and unambiguous.

13 *Compare, e.g., Burkhardt v. Bailey*, 260 Mich. App. 636, 656-57, 680 N.W.2d 453,
14 464 (2004) ("But when the language of a document is clear and unambiguous,
15 interpretation is limited to the actual words used, and parol evidence is inadmissible
16 to prove a different intent. An unambiguous contract must be enforced according to
17 its terms.") (internal citations omitted), *with Pierce v. Merrill*, 128 Cal. 464, 470, 61
18 P. 64, 66 (1900) ("Where the terms are plain and certain . . . the court will be
19 guided by the language used and construe the intention of the parties to have been
20 in accordance with their agreement").

21 Additionally, both states construe express indemnity contracts according to
22 the general rules of contract construction. *Compare Zurich Ins. Co. v. CCR and*
23 *Co.*, 260 Mich. App. 599, 603-04, 576 N.W.2d 392, 395 (1997), *with Prince v.*
24 *Pacific Gas & Elec. Co.*, 45 Cal. 4th 1151, 1158, 90 Cal. Rptr. 2d 732, 737 (2009)
25 ("Express indemnity generally is not subject to equitable considerations...; rather, *it*
26 *is enforced in accordance with the terms of the contracting parties' agreement*").

27 Accordingly, if it matters, Michigan law applies to this dispute, although
28 California law appears to be no different.

ARGUMENT

I. Neither Old GM nor New GM Breached the Dealer Agreement.

A party claiming a breach of contract must establish by a preponderance of evidence that (1) there was a contract, (2) the other party breached the contract, and (3) the party asserting breach of contract suffered damages as a result of the breach.

Miller-Davis Co. v. Ahrens Constr., Inc., No. 284037, 2012 Mich. App. LEXIS 559 (Mar. 22, 2012). Plaintiffs allege that New GM – which did not exist when the insurers decided to settle the claims against Renick – somehow breached the Dealer Agreement as a result of Old GM’s refusal to pay the settlement amount on behalf of Renick to settle the *Deutsch* Action, and Old GM’s subsequent withdrawal of its agreement to defend Renick after the dealer’s insurers, on their own volition, decided to settle the case against the dealership. Compl. ¶¶ 60, 64. Plaintiffs’ claims fail because the Dealer Agreement imposed no duty on Old GM to settle the claims against Renick or to indemnify Renick or its insurers for the settlement the insurers had elected to make for their own purposes.

A. Old GM fulfilled its obligations under the Dealer Agreement.

By letter dated May 16, 2008, Old GM agreed to defend and indemnify Renick against any monetary judgment in the *Deutsch* Action. As required, Old GM provided Renick with representation by the Dykema firm. There can be no dispute that Old GM and Dykema continued to vigorously defend Renick against the merits of the claims asserted against the dealership in the *Deutsch* Action until Renick's insurers unilaterally decided to accept the policy limits demand of the *Deutsch* Plaintiffs. In fact, the plaintiff insurers admit in their Complaint that New GM "provided a defense to Renick until June 1, 2009." Compl. ¶58. At no time prior to the insurers' settlement of the claims did Old GM ever communicate to Renick that it did not intend to continue to defend and indemnify the dealership pursuant to the Dealer Agreement.

1 It was not until *after* the plaintiff insurers agreed to settle the *Deutsch* Action
2 on June 1, 2009, that the Dykema firm advised Renick that it would not be able to
3 continue to represent it, and Old GM re-tendered the defense. Old GM and
4 Dykema took such action because, following the settlement, there was no longer a
5 claim to defend. Old GM also had the right to withdraw its agreement to indemnify
6 Renick against monetary judgments because there was not going to be one.

7 **B. The Dealer Agreement imposes no duty to settle claims or to
8 indemnify the Dealer – let alone its insurers -- for settlements.**

9 New GM admits that under Article 17.4 of the Dealer Agreement, Old GM
10 had a duty to defend Renick and indemnify it for any monetary judgment based on
11 claims involving a product defect. Old GM did not, however, have any duty to
12 settle claims on behalf of Renick, regardless of whether Renick's insurers or the
13 dealership believed the settlement offer to be reasonable. Old GM similarly had no
14 duty to reimburse Renick's insurers for paying a settlement that Old GM did not
15 approve in advance.

16 Not only are these obligations absent from the Dealer Agreement, but they
17 are logically inconsistent with a manufacturer's strong interest in controlling the
18 course and outcome of litigation in which a product defect is alleged. As noted
19 above, once Old GM accepted Renick's indemnification request, it was "playing
20 with its own money," and was entitled to make the decision to defend or settle the
21 litigation. Article 17.4 clearly was intended to give GM control over litigation
22 involving its products – and to evaluate unilaterally and bear the risk that goes with
23 that control if it decided not to settle.

24 The burden is on plaintiffs to establish that the contract includes the duty on
25 which they base their claims. *See Mich. Stamping Co. v. Mich. Emp'rs Cas. Co.*,
26 235 Mich. 4, 14, 209 N.W. 104, 107 (1926). Under Michigan law, courts construe
27 indemnity contracts in the same manner as contracts generally. *Badiee v. Brighton*
28 *Area Schs.*, 265 Mich. App. 343, 351, 695 N.W.2d 521, 531 (2005). When

1 construing a contract, the goal is to ascertain and enforce the parties' intent on the
2 basis of the plain language of the contract, and, if the terms of a contract are
3 unambiguous, their construction is for the Court to determine as a matter of law.
4 *New Freedom Mortg. Corp. v. Globe Mortg. Corp.*, 281 Mich. App. 63, 75-76, 761
5 N.W.2d 832, 840 (2008); *Martin v. City of E. Lansing*, 249 Mich. App. 288, 291,
6 642 N.W.2d 700, 702 (2001); *American Fellowship Mut. Ins. Co. v. Ins. Co. of*
7 *N.A.*, 90 Mich. App. 633, 636, 282 N.W.2d 425, 427 (1979). If the contract is clear
8 and unambiguous, the contract must be enforced according to its terms. *Burkhardt*
9 *v. Bailey*, 260 Mich. App. at 656-57, 680 N.W.2d at 464.

10 Plaintiffs can offer no evidence to establish that the Dealer Agreement
11 imposed any duty on Old GM to settle claims on behalf of Renick or to reimburse
12 Renick's insurers for their voluntary settlement payments on behalf of Renick.
13 Plaintiffs' interpretation of the Dealer Agreement – that it *implicitly* requires
14 reimbursement of unapproved settlements – would give dealers and their insurers a
15 "blank check" to settle a case whenever and for whatever amount they pleased.
16 Plaintiffs' claim that GM had such an implicit obligation simply makes no sense:
17 on their theory, GM would have to relinquish control over litigation involving its
18 products, but retain all of the risk, including risk to the dealers' insurers which
19 Article 17.4 nowhere contemplates. Such an implied contract argument finds no
20 basis in the language of the Dealer Agreement and is anathema to the language and
21 evident purpose of its express indemnification provisions.⁵ California law is
22 especially supportive of this conclusion. *See Shapiro v. Wells Fargo Realty*
23 *Advisers*, 152 Cal. App. 3d 467, 482, 199 Cal. Rptr. 613, 622 (1984) ("there cannot

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25 ⁵ The insurance policies issued by Granite State and Federal similarly provided that
26 the insurers are not responsible for a settlement reached by an insured without its
27 approval. Federal's Neil Huber, who made the decision to settle on Renick's
28 behalf, testified that the reason for such provision is "to ensure that a policyholder
doesn't make a commitment without our consent," . . . "because we want to manage
our own exposure." (Deposition of Neil Huber at 114-15, Ex. Appx., Ex. Q.)

1 be a valid express contract and an implied contract, each embracing the same
2 subject, but requiring different results"); *Crossen v. Foremost-McKesson, Inc.*, 537
3 F.Supp. 1076, 1077 (N.D. Cal. 1982); *Crain v. Burroughs Corp.*, 560 F.Supp. 849,
4 852 (C.D. Cal. 1983).

5 By its plain language, the Dealer Agreement only imposed a duty on Old GM
6 to defend and pay monetary judgments, not to fund unilateral settlements made by
7 the dealer or its insurers. Old GM's obligations in this regard were fully and clearly
8 set forth in Article 17.4 of the Renick Dealer Agreement: "General Motors will
9 assume the defense of Dealer and indemnify Dealer against any ***judgment*** for
10 monetary damages or rescission of contract" under certain circumstances.
11 (Emphasis added.) This clear and unambiguous provision, which was specifically
12 cited in Mr. Brown's letter agreeing to defend Renick, must be enforced according
13 to its terms.

14 To the extent the agreement between Renick and Old GM addresses
15 settlement at all, it is in the limited factual context in which GM does not defend
16 the dealer, but only agrees to indemnify it. The Service Manual, which is
17 incorporated by reference into the Dealer Agreement (Ex. A, Art. 17.4.3.),
18 unequivocally states that a dealer will only be reimbursed in that situation for
19 payment of a final settlement "***if such amount was approved in advance by GM.***"
20 (Ex. D, Art. 7.1.4(c)) (emphasis added). Even though this section does not apply
21 here because Old GM did agree to defend Renick, it shows that when GM intended
22 to extend its indemnification obligations to settlement, it knew how to do so, and
23 when it did so it expressly disclaimed any obligation for a settlement that it did not
24 approve in advance. Under these circumstances, it can only be concluded that the
25 exclusion of the word "settlement" from Article 17.4 was deliberate.

26 In fact, consistent with that conclusion, Article 17.4 provides expressly that
27 the "obligations assumed by General Motors are limited to those specifically
28 described in this Article [17.4] and in the [GM Service Manual]." Article 17.4

1 itself plainly does not “specifically describe” any obligation to indemnify the
2 dealership for settlements. And, as just noted, the GM Service Manual equally does
3 not create any obligation to indemnify the dealership for settlements where, as here,
4 GM agrees to defend the dealership as opposed to authorizing the dealership to
5 defend itself. And even if, as was not the case, GM had authorized Renick to
6 defend itself, it still would not have been liable for any settlement it did not approve
7 in advance. Surely the plaintiff insurance companies cannot have any greater rights
8 here.

9 **II. Plaintiffs’ “Express Indemnity” Claim Similarly Fails Because the
10 Indemnification Provision Does Not Cover Settlements.**

11 In order to prevail on their express indemnity claim, plaintiffs must prove
12 that their loss – their \$6 million payment to the *Deutsch* Plaintiffs to settle on behalf
13 of Renick – was covered by the indemnification provision, the very same thing they
14 must prove to establish their breach of contract claim. *See Raines v. Nat'l
15 Emergency Servs.*, No. 189997, 1996 Mich. App. LEXIS 506, at *7 (Dec. 13, 1996)
16 (plaintiff had to establish that the contracting parties intended that defendant
17 indemnify the indemnitee for the kind of losses it suffered in order to support a
18 claim for contractual indemnification). As shown above, plaintiffs have not and
19 cannot prove that Old GM had or New GM has any obligation to indemnify
20 Renick's insurers for their independent decision to accept the *Deutsch* Plaintiffs'
21 policy limits demand.

22 Proper analysis of this claim exactly tracks the analysis of plaintiffs' breach
23 of contract claim set forth above. In a contractual indemnity action, the threshold
24 question of whether the fact situation is covered by the indemnity contract generally
25 requires only a straightforward analysis of the facts and the contract terms. *Grand
26 Trunk W.R.R., Inc. v. Auto Warehousing Co.*, 262 Mich. App. 345, 357, 686
27 N.W.2d 756, 764 (2004); *accord Prince v. Pacific Gas & Elec. Co.*, 45 Cal. 4th at
28 1158, 90 Cal. Rptr. 2d at 737 (“Express indemnity ... is enforced in accordance

1 with the terms of the contracting parties' agreement"). Where the parties have
2 expressly contracted with respect to the duty to indemnify, the extent of the duty
3 must be determined from the language of the contract, and this Court may not look
4 outside the contract to assess the parties' intent. *See Grand Trunk*, 262 Mich. App.
5 at 353, 686 N.W.2d at 762 (general rules for contractual indemnity apply to claims
6 of indemnity in commercial transactions, rather than the specific rules governing an
7 insurer's duty to defend); *Martin*, 249 Mich. App. at 291, 642 N.W.2d at 702;
8 *Detroit Edison Co. v. City of Detroit*, No. 278778, 2009 Mich. App. LEXIS 1441,
9 at **10-11 (June 25, 2009).

10 Under Michigan law, indemnity contracts are construed most strictly against
11 the party seeking indemnification. *Liberty Mut. Ins. Co. v. Curtis Noll Corp.*, 112
12 Mich. App. 182, 191, 315 N.W.2d 890, 895 (1982) (citing *Gartside v. Young Men's
13 Christian Ass'n*, 87 Mich. App. 335, 339, 274 N.W.2d 58 (1978), and *Robinson v.
14 A.Z. Shmina & Sons Co.*, 96 Mich. App. 644, 649, 293 N.W.2d 661 (1980)).

15 Further, it is well settled under Michigan law that the indemnity promised, as
16 expressed in the written contract, may not be enlarged by proof of intention outside
17 of the contract. *Mich. Stamping*, 235 Mich. at 13-14, 209 N.W. at 107 (affirming
18 trial court's directed verdict in favor of insurer in an action by insured to require
19 insurer to indemnify it for sums it expended to settle a wrongful death lawsuit and a
20 personal injury lawsuit where unambiguous language of the policy did not cover the
21 claims asserted in the case).⁶

22
23

⁶ California law is the same. *See Rossmoor Sanitation, Inc. v. Pylon Inc.*, 13 Cal.
24 3d 622, 628, 119 Cal. Rptr. 449, 452 (1975) (in their interpretation of an express
25 indemnity contract, courts may not extend the obligation of the indemnitor beyond
26 the terms of the contract, nor may they draw from the independent doctrine of
27 equitable indemnity and consider equity in their interpretation) (emphasis added);
28 *Prince*, 45 Cal. 4th at 1158, 90 Cal. Rptr. 2d at 732 ("Express indemnity generally
 is not subject to equitable considerations...; rather, it is enforced in accordance
 with the terms of the contracting parties' agreement") (emphasis added).

1 The court in *Michigan Stamping* quoted a prior decision of the Supreme
2 Court of Michigan in which the court stated: “The offered testimony was not
3 limited to showing the consideration of the contract merely, but sought to change
4 the scope and effect of the contract, and to cast upon the defendant an obligation
5 which the contract did not require of it. The court properly rejected such
6 testimony.” *Id.* (quoting *Foley v. Railway Co.*, 168 Mich. 496, 497, 134 N.W. 446,
7 446 (1912)).

8 There is no dispute about what the Dealer Agreement says. The obligation of
9 Old GM to indemnify Renick is set forth in Article 17.4 of the Renick Dealer
10 Agreement, which states: “General Motors will assume the defense of Dealer and
11 indemnify Dealer against any ***judgment*** for monetary damages or rescission of
12 contract, less any offset recovered by Dealer, in any lawsuit naming Dealer as a
13 defendant relating to any Product that has not been altered” (emphasis added).
14 By the contract’s clear and unambiguous terms, when Old GM agreed to defend a
15 dealership, Old GM only had a duty to indemnify the dealership for any judgment.
16 Just like in *Michigan Stamping*, plaintiffs here seek to have this Court read into the
17 Renick Dealer Agreement an obligation that is not there – an obligation to settle a
18 case upon demand, or to indemnify Renick for a settlement. Michigan law, as well
19 as California law, is clear, however, that this Court cannot go outside the four
20 corners of the Dealer Agreement to expand Old GM’s indemnification obligation to
21 Renick. The contract’s language is clear and unambiguous that Old GM will
22 indemnify Renick for ***judgments***, not settlements, especially those to which Old
23 GM did not agree. To interpret the contract any other way would be in direct
24 contravention of well-established Michigan contract and indemnification law.

25 **III. Plaintiffs Have No Standing to Pursue a Claim Based on Breach of
26 Contract or Express Indemnity.**

27 Neither Granite State nor Federal has any right under the Dealer Agreement
28 because they are neither parties to the contract nor third-party beneficiaries.

1 Therefore, they lack standing to assert any claims arising out of the Dealer
2 Agreement. Whether a party is a third-party beneficiary must be determined from
3 the language of the contract **only**, *Shay v. Aldrich*, 487 Mich. 648, 664, 790 N.W.2d
4 629, 639 (2010), and the Dealer Agreement expressly disclaims any third-party
5 beneficiaries. *See* Art. 17.9. “The mere fact that a third person would incidentally
6 benefit does not give the third person a right to sue for the breach of contract.”
7 *Schmalfeldt v. N. Pointe Ins. Co.*, 252 Mich. App. 556, 562, 652 N.W.2d 683, 687
8 (2002).

9 When a court determines a party has no third-party beneficiary rights under a
10 contract, that party cannot maintain an action based on that contract, whether styled
11 as a claim for breach of contract or a claim for indemnification. *See, e.g., Oetting v.*
12 *Nabil*, No. 187692, 1997 Mich. App. LEXIS 3536, at **5-6 (February 14, 1997)
13 (determining that plaintiff had no third-party beneficiary rights and, thus, the trial
14 court’s grant of summary disposition on plaintiff’s claim for breach of contract was
15 proper); *Detroit Sch. Dist. v. URS Corp.*, No. 267715, 2006 Mich. App. LEXIS
16 2398, at **9-10 (July 27, 2006) (holding that trial court did not err in dismissing
17 plaintiff’s claim for contractual indemnification because plaintiff could not bring
18 suit under a contract to which it was not a party and under which it did not have any
19 third-party beneficiary rights). Accordingly, plaintiffs’ breach of contract and
20 express indemnity claims must be dismissed as a matter of law.

21 **IV. New GM is Entitled to Summary Judgment on**
22 **Plaintiffs’ Equitable Subrogation Claims.**

23 As discussed above, plaintiffs’ breach of contract claim fails because there
24 has been no breach of any duty imposed by the Dealer Agreement.

25 Subrogation is the substitution of one person in the place of another **with**
26 **reference to a lawful claim**, demand, or right, so that he or she who is substituted
27 succeeds to the rights of the other **in relation to the debt or claim**, and its rights,
28 remedies, or securities. *Yerkovich v. AAA*, 461 Mich. 732, 738-39, 610 N.W.2d

1 542, 544 (2000) (emphasis added). Equitable subrogation is “a legal fiction
2 through which a person who pays a debt *for which another is primarily responsible*
3 is substituted or subrogated to all the rights and remedies of the other.” *Auto-*
4 *Owners Ins. Co. v. Amoco Prod. Co.*, 468 Mich. 53, 59, 658 N.W.2d 460, 463
5 (2003) (emphasis added). It is well-established that the subrogee acquires no
6 greater rights than those possessed by the subrogor, and that the subrogee may not
7 be a “mere volunteer.” *Id.*; *Yerkovich*, 461 Mich. at 738-39, 610 N.W.2d at 544.
8 Indeed, an equitable subrogation claim is based on the claim that the subrogor
9 would have had against the defendant. *Auto-Owners Ins.*, 468 Mich. at 63-64, 658
10 N.W.2d at 466.

11 There exists no “lawful claim” for which plaintiffs can be substituted for
12 Renick. Plaintiffs base their equitable subrogation claim on Renick’s alleged claim
13 for breach of contract. *See Compl. ¶54* (“Renick has an existing, assignable cause
14 of action for breach of contract and Granite State and Federal are subrogated to that
15 cause of action . . .”). Yet, as discussed above, New GM is entitled to judgment as
16 a matter of law on the breach of contract claim. Standing in the shoes of Renick,
17 plaintiffs are subject to any defenses New GM would have had against Renick, and
18 plaintiffs’ equitable claim fails for the same reasons plaintiffs’ breach of contract
19 claim fails. Equitable subrogation would only get plaintiffs into Renick’s shoes,
20 which are mired in legal quicksand.

21 In addition, New GM is not “primarily responsible” for the \$6 million
22 settlement the insurers paid because New GM never had any duties or obligations to
23 Renick. New GM did not even exist on June 1, 2009, the day that Renick’s insurers
24 settled the claims against Renick. After June 1, 2009, there was no claim against
25 Renick for Old GM to defend against, nor was there the potential for a judgment
26 against Renick that Old GM would have to indemnify. Accordingly, Old GM
27 retendered the defense and withdrew its agreement to indemnify on June 2, 2009.
28

1 When New GM consummated its purchase of Old GM's assets on July 10, 2009,
2 Old GM had no obligation to Renick that New GM could assume.⁷

3 **CONCLUSION**

4 For these reasons, New GM respectfully requests this Court to grant
5 summary judgment in favor of New GM and dismiss all of plaintiffs' claims as a
6 matter of law.

7 DATED: July 30, 2012

ISAACS CLOUSE CROSE & OXFORD LLP
8 GREGORY R. OXFORD

9 By: [s] Gregory R. Oxford
Gregory R. Oxford

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11 ⁷ California law sets forth specific elements that plaintiffs asserting equitable
12 subrogation claims must establish: "(i) the insured suffered a loss for which the
13 defendant is liable, either as the wrongdoer whose act or omission caused the loss
or because the defendant is legally responsible to the insured for the loss caused by
the wrongdoer; (ii) the claimed loss was one for which the insurer was not
14 primarily liable; (iii) the insurer has compensated the insured in whole or in part for
15 the same loss *for which the defendant is primarily liable;* (iv) the insurer has paid
16 the claim of its insured to protect its own interest and not as a volunteer; (v) *the*
insured has an existing, assignable cause of action against the defendant that the
insured could have asserted for its own benefit had it not been compensated for its
loss by the insurer; (vi) the insurer has suffered damages caused by the act or
17 omission upon which the liability of the defendant depends; (vii) justice requires
18 that the loss be entirely shifted from the insurer to the defendant, whose equitable
19 position is inferior to that of the insurer; and (viii) the insurer's damages are in a
20 liquidated sum, generally the amount paid to the insured (or adverse party asserting
21 a claim against the insured). *Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking*
22 *Co.*, 182 Cal. App. 4th 23, 32, 105 Cal. Rptr. 3d 606, 613 (2010). Under California
23 law, plaintiffs' equitable subrogation claim would fail under subparts (i), (iii) and
24 (v) of this test because, for the reasons set forth above, neither Old GM nor New
25 GM was "legally responsible" or "primarily liable" for the insurers' loss and,
26 further, because Renick does not have "an existing, assignable cause of action
27 against [New GM]," which did not even exist at the time the plaintiff insurers
28 agreed to settle the *Deutsch* Action, that Renick could have asserted for its own
benefit had it not been compensated for its loss by the insurer." See *Ventura County*
Employees' Retirement Assoc. v. Pope, 87 Cal. App. 3d 938, 952, 151 Cal. Rptr.
695, 705 (1978) ("Rights under subrogation are derivative rights, and succession to
another's rights, like water, cannot rise higher than its source").

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